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Supreme Court of the United States

OCTOBER TERM, 1940.

No. ~~968~~. 51

IN THE MATTER

—of—

The Application of IRVING TRUST COMPANY and THOMAS F. McGLONE, JR., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, for a determination of the right of Helena Day McGlone to elect under Section 18 of the Decedent Estate Law to take against the provisions of said Last Will and Testament and Codicil thereto of John J. McGlone, deceased.

IRVING TRUST COMPANY and THOMAS F. McGLONE, JR., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, THOMAS F. McGLONE, ROSE McGLONE MEREDITH, EDWARD McGLONE and ROBERT McGLONE, infants, by RALPH L. KASKELL, JR., Special Guardian,

Appellants,

—against—

CHASE L. DAY, as Executor under the Last Will and Testament of HELENA DAY McGLONE, Deceased,

Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS.

PHILIP ZIERLER,
Counsel for Appellants Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Rose McGlone Meredith and Thomas F. McGlone.

RALPH L. KASKELL, JR.,
Special Guardian for Edward McGlone and Robert McGlone, infants.

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Appellants,
—against—
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Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS.

On February 2nd, 1922, Helena Day Snyder and John J. McGlone, both citizens of the United States, were in London.

On that day she executed and delivered to him an instrument, in script, on a letterhead of the Savoy Hotel, reading as follows:

"The Beverleys,
Osterley, Middlesex, England.
February 2—1922.
Savoy Hotel,
London
WC 2

I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that, as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably, renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized.

Helena Day Snyder"

On February 4th, 1922 they were married. This was his first and her third marital venture. The authenticated record of the marriage discloses that he was forty-seven years old, and that she represented herself to be forty-five years of age. It appears from the admission in the pleadings that her real age at the time was sixty-two. She had no children by her prior marriages, nor was there any issue from this one.

Mrs. Snyder's signature to the aforementioned document was conceded to be valid. The delivery thereof to Mr. McGlone at the time of its execution was likewise admitted.

This document contains internal evidence that Mrs. Snyder was possessed of an independent fortune and that she understandingly and voluntarily renounced all interest in the estate of her prospective husband. If the recitals therein were untrue, proof thereof—no doubt readily available to her—would have been offered at the trial, but she offered no

evidence whatever. These admissions must therefore be deemed to be true.

"These facts", said the Appellate Division, "also carry the further implication that the instrument was signed to induce the marriage. * * * The February 2, 1922 instrument had a valid consideration. The marriage constituted that consideration. It has long been recognized as 'amongst the highest considerations known to the law'" (258 App. Div. 596, 17 N. Y. Supp (2d) 316, at 321 and 323).

Agreements such as the one in the case at bar have long been enforced by the Courts of the State of New York.

In *Pierce* v. *Pierce*, 71 N. Y. 154, the Court said at page 157:

> "Antenuptial contracts whereby the future wife releases her claim to her right of dower, and all other rights to the estate of her husband upon his decease, are fully recognized in law. When fairly made and executed without fraud or imposition they will be enforced by the courts."

Tiffany in his work on Persons and Domestic Relations says at page 151:

> "There is no rule of law nor principle of public policy which prevents husband and wife from thus fixing, by an agreement before marriage, the rights which they shall have in each other's property, and relinquishing the interests which they would otherwise acquire therein by virtue of the marriage. Thus, they may relinquish their distributive shares in each other's estates, or the wife may bar her dower or the husband his curtesy."

At the time the agreement in the case at bar was made there were but two statutory provisions in effect applicable thereto—Section 31, subdivision 3 of the Personal Property Law, and Section 53 of the Domestic Relations Law. Section 31, subdivision 3 of the Personal Property Law, provides that every agreement, promise or undertaking made in consideration of marriage, except mutual promises to marry, should be in writing and subscribed by the party to be

charged therewith. Section 53 of the Domestic Relations Law provides that a contract made between persons in contemplation of marriage remains in full force after the marriage takes place.

There was no requirement of an acknowledgment. The sole requirement was that the instrument be in writing and subscribed by the person to be charged therewith.

The agreement in the case at bar therefore complied with the law in effect at the time it was made.

The language of the agreement is unambiguous. It clearly appears therefrom that Mrs. Snyder intended to relinquish every right she might thereafter acquire in the estate of her prospective husband. The nature of such right or interest is immaterial since she renounced all right, title and interest, legal and otherwise, in any estate, real or personal, of which Mr. McGlone might die seized.

About eight years after this agreement was made the Legislature enacted Section 18 of the Decedent Estate Law (Chapter 229, Section 4, Laws of 1929, as amended by Chapter 174, Section 1, Laws of 1930). By this section it was provided that where a testator dies after August 31st, 1930, and leaves a Will thereafter executed, and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy, subject to the limitations, conditions and exceptions contained in this section. Subdivision 9 of this section is as follows:

> "The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agreement so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

On August 21st, 1930, Mr. McGlone made a Will in which he referred to the waiver by his wife of all interest in his estate. He nevertheless provided that $2,000.00 be given to her or used to purchase a token for her. On July 6th, 1934, he executed a Codicil which did not disturb this provision for his wife. Under the terms of the Will and Codicil he left his estate principally to his sister, brothers and nephews.

Mr. McGlone died on February 22nd, 1937, leaving him surviving his widow, Helena Day McGlone, a sister, two brothers and three nephews. On September 23rd, 1937, Mrs. McGlone executed and filed a notice of election pursuant to Section 18 of the Decedent Estate Law to take against the Will and Codicil. Mrs. McGlone died after the trial and entry of the original decree and the proceeding thereafter became and now is a contest between the sister, brothers and nephews of Mr. McGlone and the next of kin of Mrs. McGlone.

The appellee contends that the agreement made by Mrs. McGlone did not bar her from claiming an interest in Mr. McGlone's estate because it was not acknowledged as required by subdivision 9, Section 18 of the Decedent Estate Law.

The appellants contend that under the instrument of February 2nd, 1922, which was acted upon by Mr. McGlone at the time of the marriage on February 4th, 1922, he acquired a vested contract right to bar Mrs. McGlone from claiming any interest in his estate; that this agreement was valid under the then existing statutes which did not require an acknowledgment; and that the subsequent enactment therefore violated his constitutional rights. (United States Constitution, Article I, Section 10; and the Fourteenth Amendment, Section 1.)

The appellants' contention was sustained by the unanimous decision of the Appellate Division (258 App. Div. 596, 17 N. Y. Supp. (2d) 316). At pages 322 and 323 (New York Supplement) that Court said:

> "This necessitates determining whether the above last sentence is constitutional. If it is invalid the lack of an acknowledgment is not fatal to the instru-

ment. When that instrument was executed on February 2, 1922, there vested under it in the testator certain contract rights. The instrument was valid under the pre-existing statutes (S. 53, Domestic Relations Law; S. 31, subdiv. 3, Personal Property Law), which did not require an acknowledgment; and an antenuptial agreement made in a foreign country is enforceable in this State. *Læmye* v. *Sirker*, 226 App. Div. 159, 161, 235 N. Y. S. 273; *Ross* v. *Ross*, No. 1, 233 App. Div. 626, 253 N. Y. S. 871.

"This vesting occurred before the enactment of subdivision 9, section 18, Decedent Estate Law (added by Laws of 1929, chap. 229, and amended by Laws of 1930, chap. 174). The subsequent enactment, therefore, violated the testator's constitutional rights. U. S. C. A. Const., Art. 1, S. 10; N. Y. State Const., Art. 1, S. 6. By the former a State is forbidden to pass any law impairing the obligation of contracts; and the latter provides that a person shall not be deprived of property without due process of law. As subdivision 9 invades the contract rights vesting in McGlone prior to its enactment, it is invalid. *Walker* v. *Whitehead*, 83 U. S. 314, 21 L. Ed. 357; *Edwards* v. *Kearzey*, 96 U. S. 595, 24 L. Ed. 793; *Tennessee ex rel. Bloomstein* v. *Sneed*, 96 U. S. 69, 24 L. Ed. 610; *Louisiana ex rel. Ranger* v. *New Orleans*, 102 U. S. 203, 26 L. Ed. 132; *McGahey* v. *Virginia*, 135 U. S. 662, 685, 10 S. Ct. 972, 34 L. Ed. 304; *Coolidge* v. *Long*, 282 U. S. 582, 51 S. Ct. 306, 75 L. Ed. 562; *Holmes* v. *Holmes*, 4 Barb. 295, 303; *Ralph* v. *Cronk*, 266 N. Y. 428, 195 N. E. 139; *Matter of Goldbergs' Estate*, 275 N. Y. 186, 189, 9 N. E. (2d) 829.

"The entire sentence, however, need not be invalidated. It will be sufficient to sever, void or delete the words 'so executed'. It is universally recognized that a statute may be constitutional in part and unconstitutional in part, and that the invalid part may be severed from the remainder, if after the severance the remaining portions are sufficient to effect the legislative purpose deducible from the entire act, construed in the light of contemporary events. 'The question is in every case whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether.' *People ex rel. Alpha*

Portland Cement Co. v. *Knapp*, 230 N. Y. 48, 54, 60, 129 N. E. 202, 207, per Cardozo, *J.*; *People* v. *Mancuso*, 255 N. Y. 463, 472, 473, 175 N. E. 177, 76 A. L. R. 514. The deletion of the words 'so executed' does not pervert the legislative purpose. That purpose was to save agreements previously executed. The language, however, went beyond this purpose and prescribed a form of execution more exacting than was required by pre-existing statutes and, as a consequence, violated previously vested contract rights under agreements whose form complied with the earlier statutes.

"This view has the further effect of recognizing that the sentence with the deletion of the words 'so executed' becomes declaratory, in substance, of the pre-existing statute law (S. 53, Domestic Relations Law; S. 31, subdiv. 3, Personal Property Law) through which contract rights vested in the testator under the instrument of February 2, 1922, and which were acted upon by McGlone at the time of the marriage on February 4, 1922. So far as the form of the instrument, therefore, it is completely effective as being in compliance with subdivision 9, section 18, Decedent Estate Law, so far as the same is valid."

The Court of Appeals expressed no disagreement with the opinion of the Appellate Division, except its conclusion that the statute aforementioned is repugnant to the Constitution of the United States and invaded the contract rights which vested in Mr. McGlone prior to its enactment. (*In re McGlone's Will*, 284 N. Y. 527 at 533.)

The appellee also contends, as a bar to the jurisdiction of this Court, that the document executed by Mrs. McGlone is not a contract, and that even if it is a contract, it is not effective as a waiver of her claim to an interest in Mr. McGlone's estate. The Appellate Division, however, decided that it is a contract, and the Court of Appeals did not disagree with this conclusion. Furthermore, this Court has the right to determine for itself whether it is a contract, its construction and effect, and whether its obligations have been impaired by the subsequent legislative enactment as enforced by the State Court.

In *Appleby* v. *City of New York*, 271 U. S. 364, this Court said at pages 379, 380:

> "The plaintiffs in their writ of error charge that the judgment of the Supreme Court of New York, as affirmed by the Court of Appeals, has intrepreted and enforced the Acts of 1857 and 1871 in such a way as to impair the obligation of the contract in their deeds.
>
> "The questions we have here to determine are, first, was there a contract, second, what was its proper construction and effect, and, third, was its obligation impaired by subsequent legislation as enforced by the State Court? These questions we must answer independently of the conclusion of that Court. Of course we should give all proper weight to its judgment, but we cannot perform our duty to enforce the guarantee of the Federal Constitution as to the inviolability of contracts by State legislative action unless we give the questions independent consideration. It makes no difference what the answer to them involves, whether it turn on issues of general or purely local law, we cannot surrender the duty to exercise our own judgment. In the case before us, the construction and effect of the contract involved in the deeds and covenants depend chiefly upon the extent of the power of the State and City to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself. That is a State question, and we must determine it from the law of the State, as it was when the deeds were executed, to be derived from statutes then in force and from the decisions of the State Court then and since made; but we must give our own judgment derived from such sources and not accept the present conclusion of the State Court without inquiry."

Again, in *Larson* v. *South Dakota*, 278 U. S. 429, this Court said at page 433:

> "The petitioner relies on the contract clause of the Federal Constitution, and is not prevented from invoking from this Court an independent construction of what the contract means, and whether by a proper

> construction the building of a brid[illegible]airs its obligation. * * *
>
> "We must therefore treat the questi[illegible]n as an open one and determine as an independent matter what the parties must be held to have had in mind in the use of the term 'exclusive lease'."

And in the case of *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, Justice Roberts, delivering the opinion of the Court, said at page 98:

> "Where the State court does decide against a petitioner or appellant upon an independent State ground, but deeming the Federal question to be before it, actually entertains and decides that question adversely to the Federal right asserted, this Court has jurisdiction to review the judgment, if, as here, it is a final judgment. We cannot refuse jurisdiction because the State court might have based its decision, consistently with the record, upon an independent and adequate non Federal ground. And since the amendment of the Judiciary Act of 1789 by the Act of February 5, 1867, it has always been held this Court may examine the opinion of the State court to ascertain whether a Federal question was raised and decided and whether the court rested its judgment on an adequate non Federal ground."

and at page 100:

> "As in most cases brought to this Court under the contract clause of the Constitution, the question is as to the existence and nature of the contract and not as to the construction of the law which is supposed to impair it. * * *
>
> "On such a question, one primarily of State law, we accord respectful consideration and great weight to the view of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation. This involves an ap-

praisal of the statutes of the State and the decisions of its courts."

The case at bar therefore presents for this Court's determination the question of the right of the Legislature of the State of New York to render unenforceable for want of an acknowledgment, a contract made before the effective date of Section 18 of the Decedent Estate Law, whereby a spouse waived all rights in the estate of the other spouse.

Mr. McGlone left an estate appraised for tax purposes, at $236,852.74. As a result of the decision of the Court of Appeals, one-half of this estate will be taken from Mr. McGlone's sister, brothers and nephews and turned over to the next of kin of Mrs. McGlone, notwithstanding the agreement on the part of Mrs. McGlone waiving all interest in her husband's estate. The appellants feel that this Court should pass upon the questions involved in this appeal before a result so unjust becomes absolute.

The decision of the Court of Appeals has not only rendered unenforceable the agreement in the case at bar, but has also nullified all unacknowledged agreements of every type and kind, made before the effective date of Section 18 of the Decedent Estate Law, by the terms of which a spouse or prospective spouse waived or released all rights in the estate of the other spouse.

By this decision the Court of Appeals has also made it impossible for any spouse or prospective spouse to hereafter make a binding contract in contemplation of marriage or otherwise, waiving all interest in any estate left by the other spouse, since under this decision, the Legislature can render such an agreement wholly ineffective by a subsequent enactment making some change in the rights of inheritance and recognizing a waiver only if executed in a manner not theretofore required.

The appellants therefore submit that this appeal raises questions of a substantial nature, directly involving the constitutionality of a statute of the State of New York, the validity of which has been upheld by the highest court of

that State, and that this Court has jurisdiction of this appeal.

Respectfully submitted,

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Counsel for Appellants Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Rose McGlone Meredith and Thomas F. McGlone.

RALPH L. KASKELL, JR.,
Special Guardian for Edward McGlone and Robert McGlone, infants.